U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUL 08 2005

SRC 01 070 50500

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mairjohnson

Sr Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn; the petition will be remanded to the director for further action and consideration regarding the validity of the underlying labor certification.

The petitioner is a medical clinic. It seeks to employ the beneficiary permanently in the United States as a primary care physician pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director cited the regulations relating to the employer's burden to establish its ability to pay the proffered wage and concluded that the petitioner had not established that it operated a medical clinic at a specific location. The director further asserted that the petitioner was not eligible to adjust status based on perceived grounds for revoking the waiver of the petitioner's foreign residence requirement.

On appeal, counsel asserts that the director's conclusion that a medical clinic would not operate without a state license or lease was an "inference." Counsel further asserts that the waiver of the foreign residence requirement is not relevant to adjudication of the instant petition.

On the Form I-290B Notice of Appeal, counsel asserted that he would submit a brief and/or evidence to this office within 30 days. Counsel dated the appeal December 16, 2003. On June 2, 2005, this office advised counsel by facsimile that this office had not received a supplemental submission. In response, counsel affirmed that he had not submitted a supplemental brief or additional evidence. As the initial Form I-290B specifically addressed the director's bases for denial, however, we will adjudicate the appeal on its merits.

Foreign Residence Requirement

Before discussing the more involved issues we will settle the issue of the beneficiary's foreign residence requirement. The beneficiary obtained a waiver of the two-year foreign residence requirement, which has now been revoked in a decision that purports to revoke not only the waiver but also an earlier immigrant visa petition in behalf of the beneficiary. Assuming the revocation of the waiver as part of a decision on a separate matter is valid, the beneficiary's lack of an approved waiver makes him ineligible to apply for a visa or permanent residence. Section 212(e)(iii) of the Act; 8 C.F.R. § 245.1(c)(2). Nothing in the law or regulations, however, prevents the approval of a visa petition filed in his behalf based on his failure to fulfill his two-year foreign residence requirement or obtain a valid waiver of that requirement. Thus, we withdraw the director's finding that the petition is not approvable based on the then-pending revocation of the waiver.

Ability to Pay

While the director did not explicitly conclude that the petitioner did not have the ability to pay the proffered wage, the director quoted the regulations relating to an employer's ability to pay and noted the lack of net income on the petitioner's tax returns. Thus, we will address this issue. The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence

> that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on May 12, 2000. The proffered wage as stated on the Form ETA 750 is $118,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not list any employment after 1995. On his Form G-325A Biographic Information, submitted in support of his adjustment application, the beneficiary claimed to have begun working for the petitioner in September 1999.

On the petition, the petitioner claimed to have been established in 1999, to have a gross annual income of $250,000, and to currently employ three workers. In support of the petition, the petitioner submitted unaudited financial statements for June 30, 2000 and its 1999 U.S. Corporation Short-Form Income Tax Return, Form 1120-A.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on November 16, 2001, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of its 2000 federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also requested quarterly returns.

In response, the petitioner submitted its quarterly returns for the first three quarters of 2001 reflecting three employees, including the beneficiary, and its 2000 tax return. In response to a subsequent request for additional evidence, the petitioner submitted the beneficiary's Form W-2 wage and tax statements from the petitioner reflecting wages of $15,558.40 in 1999, $336,676 in 2000 and $347,000 in 2001. The petitioner also submitted a Form 1099-MISC reflecting that in 1999 the beneficiary made medical and health care payments of $23,191.47 to the petitioner during that year, more than his salary from the petitioner. The petitioner also submitted the beneficiary's personal tax returns, which reflect the income on the Forms W-2 in addition to income from self-employment with the Highland Regional Medical Center in 1999, 2000 and 2001. The petitioner also submitted his Social Security statement confirming taxed earnings of $106,037 in 1999 and $380,454 in 2000.

The petitioner's tax returns reflect the following information:

	2000	2001
Net income	($3,662)	$0
Current Assets	($1,082)	($6,642)
Current Liabilities	$6,106	($1,646)
Net current liabilities	$7,188	$4,996

On October 24, 2002, the director issued a notice of intent to deny. In that notice, the director noted that various documents provided the address of the petitioner as 228 College Street, 172 College Street, P.O. Box 1164, 8876 Hwy 610 West, 1184 Central Avenue and 60 Ratliff Street. The director further noted the slight variations in the spelling of "Dorton" in the petitioner's name on various documents.

In response, counsel notes that a corporation can have more than one address and asserts that the petitioner's gross income of more than $400,000 in 2000 and 2001 reflects the company's legitimate nature.

The petitioner submits a letter from accountant [redacted] explaining the petitioner's various addresses. Ms. [redacted] asserts that the petitioner incorrectly listed the address of one of its clinics, [redacted] on the petitioner's 1999 W-2, and should have listed the petitioner's corporate address, [redacted] Ms. [redacted] further asserts that the P.O. Box listed for the petitioner on the 2000 W-2 is Ms. [redacted] own address, but should have been listed as [redacted] Finally, Ms. [redacted] asserts that pursuant to a "911 address change," [redacted] This final claim is confirmed through a letter from Paul Maynard, 911 Coordinator for Pikeville, Kentucky.

The petitioner submitted a letter from [redacted] confirming rental of [redacted] to the petitioner since 1999. The petitioner also submitted checks documenting rental payments to [redacted] LLC.

The director, while not explicitly asserting that the petitioner had not established its ability to pay the proffered wage, concluded that the petitioner had not resolved the inconsistencies identified in the notice of intent to deny.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, while the beneficiary's payments to the petitioner in 1999 have not been explained, the petitioner has established that it employed and paid the beneficiary well above the full proffered wage in 2000 (when the priority date was established) and 2001. Thus, the petitioner's ability to pay the proffered wage cannot serve as a basis to deny the petition.

Inconsistencies

The director's basis for denying the petition, however, appears to be a general concern that the petitioner is not operating the type of business specified on the Form ETA-750A, a medical clinic. If true, such a misrepresentation is grounds for invalidating the labor certification by either the Department of Labor or Citizenship and Immigration Services. 20 C.F.R. § 656.30(d); *Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401 (Comm. 1986). While the invalidation of the labor certification underlying the instant petition would render it unapprovable, the director did not invalidate the labor certification.

The multiple addresses associated with the petitioner are not, in and of themselves, evidence of misrepresentation. The petitioner has consistently claimed that it maintains a corporate office separate from the clinic at [redacted] where the petitioner is slated to work. More problematic is the petitioner's refusal to comply with the director's request for evidence that the clinic is licensed as a clinic.

Counsel asserts that because the petitioner is outside city limits and does not conduct laboratory work, licensure is not required. Counsel's only support for this assertion that licensure is not required under Kentucky law is a letter from the Governor of Kentucky. Governor Paul Patton's letter, however, does not address this issue. Rather, Governor Patton merely asserts that the petitioner's location is within a federally designated Health Professional Shortage Area and the beneficiary will fill a local labor need by working in that location. While Governor Patton mentions the petitioner by name, he does not attest to his own personal knowledge of the petitioner's operation as a health clinic (licensed or unlicensed) or affirm that licensure is not required.

While the petitioner provides no statute or regulation exempting health clinics outside city limits that do not perform laboratory work from licensure, the director also failed to provide her own basis for finding that licensure is required.

In light of the above, we remand the matter to the director for consideration as to whether invalidation of the labor certification is appropriate based on the petitioner's possible misrepresentation of its type of business. If the director has a statutory or regulatory basis for concluding that licensure is required, she should provide that information to the petitioner and offer an opportunity for rebuttal.

More specifically, the director should advise the petitioner that KRS § 216B.105 provides:

> Unless otherwise provided in this chapter, no person shall operate any health facility in this Commonwealth without first obtaining a license issued by the Cabinet.

While this statute allows for exceptions, it forms a reasonable basis for an inquiry into the petitioner's need for licensure. The petitioner has failed to provide a statutory or regulatory rebuttal that might establish that the petitioner falls into one of the legal exceptions. In addition, 902 KAR § 20:008 provides the license procedures and fee schedules for health facilities, including primary care facilities ($270). *See also* 902 KAR § 20:058.

In light of the above, the matter will be remanded to the director for consideration as to whether invalidation of the labor certification is appropriate. As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.